BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MB Docket Nos. 07-29, 07-198
Protection and Competition Act	)	
of 1992; Review of the	)	
Commission's Program Access	)	
Rules and Examination of	)	
Programming Tying Arrangements	)	

REPLY COMMENTS OF CBS CORPORATION

Howard F. Jaeckel

51 W. 52nd Street
New York, New York 10019
Attorney for CBS Corporation

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SUMMARY

Since the retransmission statute was enacted in 1992, thousands of agreements have been concluded between broadcasters and multichannel distributors (MVPDs) with only a handful of instances in which service to the public was disrupted, usually for only a few days. A wholesale rewriting of the Commission's retransmission consent rules would therefore hardly seem indicated.

Nevertheless, a few MVPD interests effectively seek such a rewrite, using as a springboard the Commission's discrete inquiry about alleged program "tying" practices by both wholesale cable programming vendors and broadcasters.

There is no evidence that alleged "tying arrangements" made in connection with retransmission agreements have had an anticompetitive effect. Moreover, the Commission's prohibition of such agreements would be plainly contrary to the intent of Congress, which expressly contemplated that a cable operator's carriage of other broadcaster-affiliated programming could constitute part or all of the consideration for retransmission consent.

The broader proposals concerning retransmission consent rules made by some MVPD interests, most prominently the American Cable Association ("ACA"), are clearly beyond the scope of this proceeding. In any event, the "minor adjustments" to the Commission's retransmission consent rules sought by ACA would eviscerate the opportunity that Congress meant to provide for broadcasters to negotiate marketplace consideration for the use of their signals.

The proposals of ACA may be briefly summarized as follows: (1) broadcasters should be prohibited from seeking different levels of compensation from different operators absent a showing that such price distinctions are based on "cost," with the burden of justifying any price differences resting squarely on the broadcaster; (2) broadcasters should be required to offer retransmission consent for co-owned stations on a stand-alone basis, while precluding them from

insisting that *any* of those channels be carried on an operator's basic tier; (3) MVPDs should be allowed to continue to carry a television signal without retransmission consent during whatever period may be required to resolve a good-faith negotiation complaint.

ACA's proposals are irreconcilable with the intent of Congress and Commission precedent. The statutory language mandating that broadcasters negotiate in good faith with multichannel providers itself makes expressly clear that the provision does not preclude broadcasters from entering retransmission agreements with different MVPDs "containing different terms and conditions, *including price terms,* . . . if such different terms . . . are based on competitive marketplace considerations." The free-market approach contemplated by Congress is also evident in the legislative history of the 1992 Cable Act, with Congress emphasizing its intent "to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . *[not] to dictate the outcome of the ensuing marketplace negotiations*." Consistent with this legislative purpose, when the Commission later adopted rules to implement the good-faith negotiation requirement enacted by SHVIA, it expressly abjured "a substantive role in the negotiation of the terms and conditions of retransmission consent." The rate-making role that ACA invites the Commission to play in determining the proper consideration for retransmission consent could not be further from what Congress envisioned.

As to ACA's proposal that MVPDs be permitted to continue to carry a broadcaster signal during the pendency of a good-faith negotiation complaint, it is contrary to dispositive Commission precedent. Finding this approach "foreclose[d]" by the "unambiguous" language of the statute prohibiting retransmission "except . . . with the express authority of the originating station," the Commission held it had "no latitude . . . to adopt regulations permitting retransmission . . . while a good-faith or exclusivity complaint is pending . . . where the broadcaster has not consented to such retransmission."

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REPLY COMMENTS OF CBS CORPORATION

INTRODUCTION

CBS Corporation ("CBS") respectfully submits reply comments herein in response to proposals made by several parties for sweeping changes in the Commission's rules relating to retransmission consent – proposals that are pressed despite being clearly beyond the scope of this proceeding, which concerns retransmission consent only peripherally.

Despite its limited relevance in the present context, retransmission consent has been the subject of recent and close Commission scrutiny. Less than a year-and-a-half ago, in response to a statutory mandate, the FCC submitted a report to Congress "regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent . . . rules."[1] After careful

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1 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC Lexis 4976 at ¶ 1 (released September 8, 2005) ("*FCC Report to Congress*").

review, the Commission's report concluded that no changes in those rules were warranted.

That conclusion is not surprising in light of the market's less-than-tumultuous experience with the rules. Since the retransmission statute was enacted in 1992, thousands of agreements have been concluded between broadcasters and multichannel distributors (MVPDs) with only a handful of instances in which service to the public was disrupted, usually for only a few days. Indeed, the Commission's report to Congress reflected the success of the legislation, concluding that "overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals."[2]

A wholesale rewriting of the Commission's retransmission consent rules would therefore hardly seem indicated. Nevertheless, a few MVPD interests effectively seek such a rewrite, using as a springboard the Commission's discrete inquiry about alleged program "tying" practices by both wholesale cable programming vendors and broadcasters – an inquiry which is itself made in a context far removed from retransmission consent, namely, the Commission's review of its program exclusivity and program access rules applicable to vertically integrated cable programming vendors.[3]

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2 *Id.* at ¶ 44.

3 *See, Report and Order and Notice of Proposed Rulemaking,* MB Dockets 07-29 and 07-189, *Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 22 FCC Rcd 17791 (2007).

As we will show, there is no evidence that alleged "tying arrangements" made in connection with retransmission agreements have had an anticompetitive effect. Moreover, the Commission's prohibition of such agreements would be plainly contrary to the intent of Congress, which expressly contemplated that a cable operator's carriage of other broadcaster-affiliated programming could constitute part or all of the consideration for retransmission consent.

We also focus in these reply comments on the broader proposals concerning retransmission consent rules made by some MVPD interests, most prominently the American Cable Association ("ACA"). ACA characterizes its proposals – most of which are not remotely relevant to any issues raised by the *Notice of Proposed Rulemaking* ("*Notice*") herein – as "minor adjustments" to the Commission's retransmission consent rules. In fact, they would eviscerate the opportunity that Congress meant to provide for broadcasters to negotiate marketplace consideration for the use of their signals.

Before undertaking that discussion, however, we wish to dispel any suggestion that CBS has "tied" retransmission consent for its owned television stations to carriage of an affiliated cable network. Although such a proposal would be entirely consistent with applicable Commission precedent, CBS has not in fact conducted its retransmission negotiations in this way.

DISCUSSION

I. While CBS Has Reached Bundled Retransmission Agreements, it Does Not Insist on Carriage of Affiliated Non-Broadcast Networks as a Condition of Retransmission Consent.

In its comments, ACA asserts that "[w]hen dealing with small and medium-sized cable companies, owners of 'must have' satellite channels almost invariably tie or bundle those channels with less desired (or undesired) channels."[4] ACA goes on to claim, in a table presented on page 7 of its comments, that CBS ties retransmission consent for its owned CBS network affiliates to carriage of (1) CSTV, an affiliated cable network and (2) CBS owned television stations that broadcast CW network programming.

Likewise, in its comments, Dish Network characterizes "CBS/Viacom" as being one of the main program bundling "culprits."[5] Dish Network relegates to a footnote the fact that CBS has been a publicly-traded company wholly independent from Viacom for more than two years.[6]

The above suggestions that CBS engages in coercive program "tying" or "bundling" are untrue. The facts are as follows.

CBS owns a cable network, CSTV (College Sports Television),[7] and a number of premium pay services through its subsidiary, Showtime Networks, Inc. ("SNI").[8]

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4 ACA Comments at 5-6.

5 Comments of Dish Network at 8.

6 *See* note 9, *infra*.

7 Through CSTV, CBS also holds an interest in MountainWest Sports Network, a joint venture of CSTV, Comcast Corporation and the Mountain West Conference.

Since becoming an independent company on December 31, 2005,[9] CBS has completed retransmission agreements with more than 25 cable operators accounting for over 2.5 million subscribers. In these negotiations, CBS's initial proposal in each instance was for cash consideration for carriage of its television stations only, without any reference to its cable networks.

In subsequent discussions, the subject of a possible bundled deal has sometimes arisen, often at the specific request of the cable operator, or at the suggestion of CBS in response to the operator's request for something other than a straight cash-for-retransmission proposal. However, when offering a bundled rate, CBS has consistently stressed to operators (1) that it was entirely willing to negotiate retransmission consent on a stand-alone basis and (2) that while it sought to offer attractive combined terms for a package agreement, a bundled deal would *increase*, rather than reduce, the operator's total cash outlays, so that a combined deal would only benefit the operator to the extent it was affirmatively interested in carrying all services included in the proposed agreement.

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8 SNI owns the premium service Showtime, as well as The Movie Channel and Flix. Together with the Smithsonian Institution, it has a joint venture interest in the Smithsonian Channel

9 Prior to the above date, Viacom Inc. ("Viacom") was the ultimate corporate parent of the CBS owned television stations. As of December 31, 2005, Viacom effected a corporate reorganization in which the name of the ultimate parent company of those stations was changed to CBS Corporation, while other businesses previously owned by Viacom, including the MTV Networks, were spun-off into a new publicly-owned company that was given the Viacom name. The above discussion concerns retransmission negotiations in which CBS has been involved subsequent to this corporate restructuring.

Thus CBS has not required the carriage of any non-broadcast network as a condition of granting retransmission consent. Notably, however, we have experienced situations in which an MVPD has insisted on negotiating retransmission consent for the CBS owned television stations simultaneously with an affiliation agreement for one of CBS's cable networks, apparently in the belief that its leverage as a distributor of the cable service could improve its bargaining position on retransmission consent.

With respect to alleged "tying" arrangements involving co-owned broadcast stations, CBS has not encountered a situation in which a cable operator has not carried a CBS owned television station licensed to a market in which the operator owned an existing system. That is true whether the CBS owned station broadcast the programming of the CBS Television Network, the CW Network, MyNetwork TV, or operated as an independent station. Any suggestion on an operator's part about dropping a home-market CBS owned station has invariably followed a request for consideration by CBS. As both a federal court and the Commission have indicated, an operator's claim under these circumstances that it is being coerced by a "tying" arrangement to carry a station that it suddenly characterizes as "undesired"– although it has long been part of its line-up -- is to be viewed with the greatest skepticism.[10]

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10 *See, Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, 460 F. Supp. 2d 1012 (S.D. Iowa 2006); *EchoStar Satellite Corp. v. Young Broadcasting, Inc.,* 16 FCC Rcd 15070 (2001). In *Mediacom*, the court took note of the cable operator's prior voluntary carriage of a television group owner's non-network stations in finding unpersuasive the operator's claim that the broadcaster sought to compel carriage of those stations as a condition of granting retransmission consent for its major-network affiliates. The court reasoned as follows:

> Mediacom [the cable operator] had the right to terminate the carriage of any, or all, of the Tied Stations.

In this connection, for example, we note ACA's strikingly inconsistent claims concerning the desire of its members to carry stations affiliated with the CW Network. In its table purporting to identify "tying and bundling" arrangements reached in connection with retransmission negotiations, ACA characterizes CW affiliates as the "tied" channel (i.e., the "less desired (or undesired) channel[ ]") when the subject is retransmission agreements for owned CBS network stations; however, The CW Network becomes the "tying" channel – i.e., the "must have" programming – when retransmission agreements with Tribune Company are examined.[11]

In any event, as we discuss below, both the Commission's decisions and the legislative history of the retransmission consent statute make clear that distribution of a co-owned television station or cable network is a perfectly legitimate form of consideration for broadcasters to seek in the marketplace negotiations envisioned by Congress.

> Mediacom, however, never previously exercised [this] right . . . . Although Mediacom has every business right to drop whatever station and program that it wishes, the evidence does not support the conclusion that Mediacom is being forced to carry the Tied Stations.

Id. at 1024-25. In *EchoStar*, the Commission followed the same line of reasoning in rejecting the satellite carrier's tying claim:

> EchoStar's argument that it must utilize scarce channel capacity in order to carry local signals that it does not wish to carry is not persuasive [in light of] evidence that EchoStar was willing to carry all three Young stations if acceptable terms were found.

16 FCC Rcd at 15083.

11 ACA Comments at 7.

II. <u>There is No Basis for Precluding Retransmission Proposals Requiring an Operator's Carriage of Affiliated Broadcast and Non-Broadcast Channels.</u>

In their comments, ACA and Dish Network claim that broadcasters have unfairly tied retransmission consent for highly popular, "must have" television stations to carriage of affiliated non-broadcast networks, or co-owned broadcast stations in the same or a distant market.[12] They therefore call for a rule precluding retransmission proposals that include such "tying" arrangements.

The Commission, however, can hardly prohibit a form of consideration for retransmission consent that Congress expressly contemplated. Thus, in enacting the retransmission consent provision in the 1992 Cable Act, the Senate Commerce Committee observed that broadcasters in retransmission negotiations might seek forms of consideration other than money, including "joint marketing efforts, the opportunity to provide news inserts on cable channels, *or the right to program an additional channel on a cable system.*"[13] All these forms of consideration, the Committee's discussion clearly indicated, would be legitimate for broadcasters to seek in exchange for the right to retransmit their signals.

The Commission, too, has recognized that program carriage agreements are an appropriate type of consideration for retransmission consent. In adopting rules to implement the "good faith negotiation" requirement enacted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),[14] the Commission expressly

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[12] ACA Comments 7-9; Dish Network Comments at 3, 17-18, 20.

[13] Senate Report 102-92 at 35-36 (emphasis added).

[14] Act of Nov.29,1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title I of the

stated that conditioning retransmission consent on carriage of an "affiliated cable programming service, or another broadcast station either in the same or a different market" is "presumptively . . . consistent" with a broadcaster's obligation to negotiate in good faith. *See, First Report and Order,* CS Docket No. 99-363, *Implementation of Satellite Home Viewer Improvement Act; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445, 5469 (2000) (hereafter "*Good Faith Order*"). Finding "[nothing] to suggest that . . . requesting an MVPD to carry an affiliated channel [or] another broadcast signal in the same or another market . . . is impermissible or other than a competitive marketplace consideration,"[15] the Commission rejected the suggestion of certain MVPDs that such proposals be declared off-limits in retransmission negotiations. On the contrary, the Commission recognized that

> arbitrarily limit[ing] the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.[16]

In a case involving Dish Network – which in this proceeding presses again for a ban on such agreements – the Commission once again affirmed that bundled retransmission consent proposals are completely consistent with the obligation to

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Intellectual Property and Communications Omnibus Reform Act of 1999.

15 *Good Faith Order*, *supra,* 15 FCC Rcd. at 5469.

16 *Id.*

negotiate in good-faith. In that case,[17] EchoStar Satellite Corporation (then the parent company of Dish Network) claimed that Young Broadcasting had failed to bargain in good faith because it refused meaningfully to negotiate about retransmission consent for its network-affiliated stations separately from the independent stations it also owned. In that regard, EchoStar argued that an *a la carte* offer made by Young for its network stations alone did not present a real alternative, since the price demanded for those stations was four times greater than the fee it sought for a package including the independent stations.

The Commission rejected the argument that Young's offer was coercive, stating:

> The fact that Young priced its *a la carte* price higher than that of the three channel package reflects Young's *legitimate desire* to have all three channels carried, if possible. EchoStar was free to accept either of Young's proposals, to offer counter proposals to any or all of Young's proposals or, as it did here, to cede carriage of all three channels. The fact that Young sought to occupy three channels of satellite transponder capacity, however, in no way violates our good faith retransmission consent rules.[18]

Apart from the handful of anecdotes proffered by ACA concerning the experiences of anonymous operators, the record is utterly devoid of evidence suggesting that the alleged tying practices have adversely affected competition or harmed cable subscribers in any way. Notably, the alleged "market power" attributed by ACA to the owners of "must have" television stations – the putative "tying" product

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17 *EchoStar Satellite Corp. v. Young Broadcasting Inc.*, 16 FCC Rcd 15070 (2001).

18 *Id.* at 15083 (emphasis added).

– has not resulted in any diminution of competition in the so-called "tied" market – namely, the market for satellite-delivered cable programming. Indeed, any such claim is belied by the explosive proliferation of satellite-delivered cable networks – the total number of which was most recently determined by the FCC to be 531 national networks, representing a 36 percent increase over the 2004 figure.[19] These statistics reduce to absurdity any suggestion that bundled retransmission deals have had the effect of suppressing competition in the larger market for cable network programming.

Only such a showing of adverse effects on the broader market could conceivably justify promulgation of an across-the-board rule banning retransmission deals packaging together a number of stations or non-broadcast services. As one court recently observed in finding unpersuasive an operator's claim that a broadcaster's bundled retransmission proposal was anticompetitive, the "antitrust laws were passed for the protection of competition, not competitors."[20]

III. ACA's Proposals Cannot be Adopted Since They Are Directly Contrary to the Intent of Congress in Enacting Retransmission Consent as Previously Interpreted by the Commission.

In addition to arguing that this Commission should ban retransmission proposals calling for carriage of other broadcaster-affiliated programming, ACA floats a number of other proposals for changes in the Commission's rules governing retransmission negotiations that are wholly unrelated to the subject matter of this proceeding.

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19 *See, Twelfth Annual Report, Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2509-10 (2006).

20 *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, *supra,* 460 F. Supp. 2d at 1020 (internal quotations omitted).

Although the Commission could not, as a matter of basic administrative law, now adopt those proposals,[21] ACA will doubtless continue to press them in other venues. A discussion of their merits is therefore in order.

The "minor adjustments" [22] to the FCC's rules sought by ACA may be briefly summarized as follows.

First, ACA proposes that broadcasters be prohibited from seeking different levels of compensation from different operators absent a showing that such price distinctions are based on "cost." [23] The burden of establishing the "reasonableness" of any differences in the per-subscriber rates charged by a broadcaster to various MVPDs would, under the scheme envisioned by ACA, rest squarely on the broadcaster.[24]

Next, ACA would have the Commission require that broadcasters offer retransmission consent for co-owned stations on a stand-alone basis, while precluding them from insisting that *any* of those channels be carried on an operator's basic tier. A broadcaster wanting basic tier distribution would have to offer a cable operator

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21 *See,* 5 USC § 553. Also beyond the scope of this proceeding are the proposals of the National Telecommunications Cooperative Association to bar stations that seek consideration for retransmission consent from exercising the protections afforded by the network non-duplication and syndicated exclusivity rules, and to prohibit program suppliers from restricting the ability of their licensees to grant retransmission consent beyond their own markets. Comments of National Telecommunications Cooperative Association at 21-25. Although these matters are not now properly before the Commission, we note that the FCC "previously has refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system." *FCC Report to Congress*, *supra,* at ¶ 50.

22 ACA Comments at 25.

23 *Id.* at 26.

24 *Id.* at 24-25.

"incentives" for agreeing to such channel placement, with the adequacy of the inducements subject to FCC review – with the broadcaster, once again, bearing the burden of proof. [25]

Finally, ACA asks the Commission to relieve cable operators of any sense of urgency about reaching agreement with broadcasters on retransmission terms by allowing MVPDs to continue to carry a television signal during whatever period may be required to resolve a good-faith negotiation complaint[26] – thus affording cable operators the strategic advantage of knowing that an automatic retransmission extension is available by the mere expedient of filing a complaint with the Commission.

As we now show, these proposals are completely inconsistent with the marketplace negotiations that Congress envisioned in adopting retransmission consent.

1. Congress Intended Retransmission Rights to be Governed By Marketplace Negotiations and Expressly Rejected the Kind of Cost-Based, "Non-Discrimination" Regime Proposed by ACA.

At bottom, ACA sees retransmission consent as a kind of public utility for which a "reasonable" rate should be set by this Commission. Under the regulatory-intensive regime that it envisions, broadcasters making retransmission proposals would be precluded from taking account of factors that are the grist of everyday negotiations in the marketplace – for example, the volume of distribution (and thus the absolute level of compensation) offered by different MVPDs. Only one thing – "cost" – could justify a broadcaster's seeking a higher per-subscriber rate from one

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25 *Id.* at 25.

26 *Id.* at 26.

multichannel provider than another. ACA's rate-making approach could not be further from what Congress intended.

Thus the statutory language mandating that broadcasters negotiate in good faith with multichannel providers itself makes expressly clear that the provision does not preclude broadcasters from entering retransmission agreements with different MVPDs "containing different terms and conditions, *including price terms,* . . . if such different terms . . . are based on competitive marketplace considerations."[27] The free-market approach contemplated by Congress is also evident in the legislative history of the 1992 Cable Act, with Congress emphasizing its intent "to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . *[not] to dictate the outcome of the ensuing marketplace negotiations.*"[28]

Consistent with this legislative purpose, when the Commission later adopted rules to implement the good-faith negotiation requirement enacted by SHVIA, it expressly abjured "a substantive role in the negotiation of the terms and conditions of retransmission consent."[29] Noting that Congress had not intended it to "intrude" in retransmission negotiations, the Commission declined to scrutinize particular retransmission terms for their consistency with "competitive marketplace conditions," because to do so would effectively constitute the FCC as the arbiter of retransmission consent terms.

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27 47 USC § 325(b) (3) (C) (emphasis added).

28 Senate Report 102-92 at 36 (emphasis added).

29 *Good Faith Order*, *supra,* 15 FCC Rcd. at 5450.

Thus the only retransmission terms cited by the Commission as being inconsistent with "competitive marketplace considerations" were those "designed to frustrate the functioning of a competitive market":

> Conduct that is violative of national policies favoring competition – that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market – is not within the competitive marketplace considerations standard included in the statute.[30]

On the other hand, the *Good Faith Order* includes the following among examples of bargaining proposals that "presumptively are consistent" with competitive marketplace considerations and the good-faith requirement:

> 1. Proposals for compensation above that agreed to with other MVPDs in the same market;
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> 2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
>
> [and]
>
> 3. Proposals for carriage conditioned on carriage of any . . . affiliated cable programming service, or another broadcast station either in the same or a different market.[31]

In thus expressly endorsing broadcaster retransmission proposals that sought different levels or types of compensation from different operators, the Commission noted that Congress had considered – and explicitly rejected – a comprehensive regime

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30 *Id.* at 5470.

31 *Id.*

that would have required the FCC to "prohibit television broadcast stations that provide retransmission consent from engaging in discriminatory practices, understandings, arrangements, and activities . . . that prevent a multichannel video programming distributor from obtaining retransmission consent from such stations."[32] In light of "the express congressional rejection of this anti-discrimination provision," the Commission declined "to adopt rules to recreate [it] by regulation."[33]

Moreover, although the Commission indicated that a multichannel provider could rely on the "totality of the circumstances" in addition to certain "objective factors" in making a complaint under the good-faith negotiation rule, it stressed that it would not allow "the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties." [34]

With this background, we examine the specific proposals made by ACA. Each of them is irreconcilable with the principles thus articulated by Congress and the Commission.

2. There is No Basis for Prohibiting "Price Discrimination" in Retransmission Consent Negotiations.

As noted above, in enacting the good-faith negotiation requirement, Congress was careful to specify that it did not preclude broadcasters from entering retransmission agreements with different MVPDs containing different terms, including price terms, "based on competitive marketplace considerations." ACA nonetheless asks the

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32 *Id.* at 5450-51.

33 *Id.* at 5451.

34 *Id.* at 5458.

Commission to turn this statutory language on its head by prohibiting "price discrimination"[35] in carriage agreements.

The Commission has already rejected similar pleas that it referee retransmission negotiations to temper the rough-and-tumble of the marketplace. Thus, in the rulemaking proceeding to implement the good-faith negotiation statute, a number of satellite carriers urged that "competitive marketplace considerations" be interpreted as requiring that different price terms be justifiable by reference to the varying costs of delivering programming to different multichannel providers, or other such "objective" factors.[36] Finding that Congress had not intended to establish an anti-discrimination

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35 Notably, the provisions of the Robinson-Patman Act making it "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality," where the effect would be to lessen competition or create a monopoly, 15 USC § 13(a), have been expressly held to be inapplicable to cable television services because they are not "commodities." *Rankin County Cablevision v. Pearl River Valley Water Supply*, 692 F. Supp. 691, 694 (D. Miss 1988); *H.R.M., Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 645 (D. Colo. 1987); *Satellite T Associate v. Continental Cablevision of Virginia, Inc.*, 586 F. Supp. 973 (E.D. Va. 1982), aff'd, 714 F.2d 351 (4th Cir. 1983). *See also Tri-State Broadcasting Co. v. United Press International, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966) (contract for sale of news information services held not to constitute sale of a commodity within contemplation of Act); *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961) (violation of Act could not be predicated on theory of discrimination in regard to sale of television broadcast time); *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 85 (D. D.C. 1977) (broadcast advertising not a commodity within Robinson-Patman Act).

36 For example, DIRECTV argued that only the following should be regarded as "competitive marketplace considerations" that a broadcaster could take into account in negotiating different terms and conditions for retransmission consent with different MVPDs:

> Reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; and

regime governing retransmission consent negotiations,[37] the Commission declined to adopt this interpretation. Instead, it emphasized Congress' intent that retransmission agreements be reached by the parties "through their own interactions and through the efforts of each to advance its own economic self interest."[38]

The Commission itself has also recognized that a "no price discrimination" regime would preclude broadcasters from tailoring their retransmission proposals to changes in the competitive environment faced by multichannel providers. Thus, in the rulemaking proceeding leading to the *Good Faith Order,* satellite carriers urged that, in order to foster their competitiveness *vis-à-vis* cable operators whom they alleged enjoyed "market power," the consideration that broadcasters realized for retransmission consent from satellite providers should not exceed that received from the cable industry. The Commission rejected this argument, noting that its acceptance would mean that "broadcasters, already the hypothesized victims of an exercise of market

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> Different prices, terms, and conditions to take into account actual, verifiable differences in the costs of delivering the programming.

Good Faith Order, supra, 16 FCC Rcd at 5465, n.108.

37 In this connection, the Commission cited the mandate of Section 628 of the Communications Act (47 U.S.C. § 548) that it prohibit discriminatory prices in the market for vertically integrated, satellite delivered cable programming, noting that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity." *Good Faith Order, supra,* 16 FCC Rcd at 5454 and note 45.

38 *Id.* at 5467.

power, would be obligated to continue in that role with other participants in the market."[39]

In other words, by freezing in place a retransmission consent *status quo* that itself resulted from vast disparities in bargaining power between broadcasters and cable operators – which at the time the Commission quite properly did not seek to redress – a regulation limiting rate disparities to those based on "cost" would stifle competition rather than promoting it.[40]

3. <u>ACA's Proposals on "Tiering" and Burden of Proof Are Simply Another Way of Preventing Compensation for Retransmission Consent From Being Determined by Marketplace Negotiations.</u>

Outlawing so-called "price discrimination" is not the only method by which ACA would seek to ensure that the value of broadcasters' signals is never determined by the marketplace. ACA would also (a) place the burden of justifying rate differentials on broadcasters and (b) require them to offer a cable operator "incentives" (i.e., price discounts) before even seeking distribution of their signals on an operator's basic tier, with the broadcaster bearing the burden of establishing the "reasonableness" of the incentives thus offered.

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39 *Id.* at 5468.

40 In this connection, we note that while ACA seeks to portray small cable operators as being particularly "vulnerable" in retransmission negotiations, there is no reason to assume that even the largest MSO will be insulated from the effects of vastly increased competition in the multichannel marketplace when existing agreements come up for renewal. *See,* Mike Reynolds, "Touchdown! KAYU-TV, Time Warner Cable Reach Retrans Deal: Six-Year Pact Enables Viewers in Spokane, Wash. To Watch Super Bowl XLII," *Multichannel News,* February 3, 2008; Mike Farrell, "Retrans on the Rise: Soaring Cable-Cash Tallies Bode Well For Broadcasters In '08 and '09," *Multichannel News,* January 7, 2008; "Comcast Pays Sinclair Rather than Give Up Providing Stations," *Television A.M.,* March 12, 2007.

The Commission has already recognized that requiring broadcasters to establish the consistency of their retransmission proposals with "competitive marketplace conditions" would saddle them with a nearly impossible burden, given the difficulty of "ascertain[ing] objective competitive marketplace factors" to justify broadcasters' negotiating positions.[41] In addition to the unfairness of such a procedure, it would be fundamentally inconsistent with the Commission's declared intent not to "sit in judgment" on proposed retransmission terms.[42] Therefore, the Commission could not adopt ACA's proposal as to "burden of proof" without effectively renouncing its *Good Faith Order*.

4. The Commission is Without Authority to Allow Continued Carriage of a Broadcast Station During the Pendency of a Good-Faith Negotiation Complaint.

In seeking a right for cable operators to continue to carry a television signal during the pendency of a good-faith negotiation complaint, ACA once again ignores dispositive Commission precedent. Thus, in the rulemaking proceeding to implement the good-faith negotiation requirement, a number of MVPDs urged the Commission to restrict a broadcaster's withdrawal of retransmission consent after such a complaint had been filed. Finding this approach "foreclose[d]" by the "unambiguous" language of the statute prohibiting retransmission "except . . . with the express authority of the originating station," the Commission held it had "no latitude . . . to adopt regulations permitting retransmission . . . while a good-faith or exclusivity complaint is pending . . .

41 *Good Faith Order, supra,* 16 FCC Rcd at 5467.

42 *Id.* at 5454.

where the broadcaster has not consented to such retransmission."[43] The Commission has no greater latitude to adopt such regulations now.[44]

CONCLUSION

In enacting the retransmission consent statute, Congress expressly indicated that agreements to carry broadcaster-affiliated programming were a legitimate form of consideration for television stations to seek in exchange for retransmission consent. The Commission accordingly cannot prohibit retransmission proposals that seek such consideration. Similarly, each of the "adjustments" suggested by ACA to the Commission's rules governing retransmission negotiations would contravene congressional intent, as indicated both by the express statutory language and the

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43 *Id.* at 5471.

44 As precedent for the Commission's allowing carriage of a television station's signal by a cable operator pending resolution of a good-faith negotiation complaint, ACA points to a condition of the FCC's order approving the acquisition of DBS provider DIRECTV by News Corporation, which owned 35 television stations through its subsidiary, Fox Television Stations, Inc ("FTS"). ACA Comments at 26. That condition permitted a competing MVPD to continue to carry an FTS owned television station that was the subject of a retransmission dispute pending completion of an arbitration proceeding that was also provided for by the Commission's order. The conditions placed on the FCC's approval of the DIRECTV transaction, pursuant to its authority over the transfer of radio licenses, *see* 47 USC § 310 (d), were found necessary by the Commission in light of "News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, *when combined with ownership of a nationwide DBS platform.*" *Applications of General Motors Corporation et ano. and News Corporation Limited, for Authority to Transfer Control*, 19 FCC Rcd 473, 565 (2004) (emphasis added). Those conditions accordingly have no relevance in the present context.

legislative history. No changes in the Commission's retransmission consent regulations are warranted.

Respectfully submitted,

CBS CORPORATION

By: ______________________
Howard F. Jaeckel
Its Attorney

51 West 52^{nd} Street
New York, New York 10019

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